Nos. 320 and 202 Misc.

IN THE

Supreme Court of the United States

October Term, 1955

GEORGE B. PARR, *Petitioner*

v.

UNITED STATES OF AMERICA

GEORGE B. PARR, *Petitioner*

v.

BEN H. RICE, *District Judge*

GEORGE B. PARR, *Petitioner*

v.

BEN H. RICE, *District Judge*

GEORGE B. PARR, *Petitioner*

v.

JAMES V. ALLRED, *District Judge*

REPLY MEMORANDUM OF THE PETITIONER

THURMAN ARNOLD
ABE FORTAS
1229 19th Street, N. W.
Washington 6, D. C.
Counsel for Petitioner

Of Counsel:
WILLIAM D. ROGERS
ARNOLD, FORTAS & PORTER
1229 19th Street, N. W.
Washington 6, D. C.
MARVIN K. COLLIE
CLYDE L. WILSON, JR.
Esperson Building
Houston, Texas
THOMAS E. JAMES
1302 Capital Nat'l Bank Bldg.
Austin, Texas
EVERETT L. LOONEY
1020 Brown Building
Austin, Texas

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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REPLY MEMORANDUM OF THE PETITIONER

Petitioner is here seeking relief from an attempt by the Department of Justice to a valid judicial order of transfer under Rule 21 of the Federal Rules of Criminal Procedure. We contend on the merits that the order of the court required that the prosecution continue, if at all, in Laredo, the division to which the case was transferred, that the Government had no right

to ask either for a transfer or a retransfer and that the device of dismissal and reindictment invented by the Government for this case is flatly inconsistent with the applicable Rules.

The entire purpose of the Government's argument in opposition is to escape a judicial determination of the propriety of the procedure which it used to accomplish the effect of removing the trial of this case from the district to which it had been transferred by previous order of the court. The central issue whether the plain and mandatory provision of Rule 21 has been violated by the device used by the prosecution to transfer the case to a district of its own choice is ignored. Except for an unsupported assertion in a footnote the Government's entire brief is devoted to highly technical grounds designed to prevent this Court from considering this central issue.

We say that the issue whether a proper interpretation of Rule 21 and Rule 48 gives the Government the power to transfer a case in violation of the mandatory language of Rule 21 cannot be evaded by the Government. A short analysis of the Government's procedural objections to a decision on the merits we believe will demonstrate this.

In its first procedural argument (Gov. Br. 8) against the Court's reaching a decision on the merits the Government assumes that the order to dismiss the first indictment has no legal connection with the bringing of a second indictment for the purpose of removing the trial from the district to which it had been transferred. If this assumption be indulged of course the order cannot be appealed since considered apart from the second indictment it is, on its face, in favor of the petitioner. To make that assumption, however, is to

beg the question. We think we have demonstrated in our petition that under no fair interpretation of the Rule can an order of dismissal made for the purpose of the transfer of the case be considered apart from that purpose.[1] The Government has not chosen to answer this argument. Instead it chooses to assume without argument that our position is not valid and to argue from that assumption that the order is not appealable.

The Government's second and alternative procedural argument (Gov. Br. 9) assumes that the petitioner is right in contending that the order of dismissal is part of a device to transfer the case in violation of the Rule. On the basis of that assumption the Government argues that the order is not appealable because it is interlocutory and not final.

It seems clear to us that the order of dismissal is a final order which should be reversed because it is an abuse of the court's discretion. It was entered in plain violation of the mandatory provision of Rule 21. It is appealable on that ground and therefore the Government cannot escape a decision on the question of whether Rule 21 has in fact been violated. The refusal of the court to follow a mandatory provision of law may also be reviewed on a prerogative writ. Therefore, a decision on the merits cannot be escaped on this procedural ground.

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[1] The Government cites *Lewis* v. *United States*, 216 U.S. 611 (1910), where an appeal from the dismissal of an indictment was dismissed because moot. The Court specifically qualified its holding to the case where "no new indictment [had] been returned against him within three years . . ." Needless to say, petitioner here would not have appealed the dismissal of his first indictment had it not been for the second.

As a third procedural objection to a decision on the merits of this case the Government contends (Gov. Br. 9, 10) that Judge Kennerly properly exercised his discretion because he heard testimony by the United States Attorney to the effect that the purpose of his motion to dismiss was to remove the case from the district to which it had been transferred.[2] This again begs the question. We say that under a proper interpretation of Rules 21 and 48 a dismissal for the purpose of transferring the case was a violation of Rule 21 and, therefore, an abuse of discretion. Thus this procedural ground also raises the central issue in the case.

The Government's final argument against the Court's deciding the merits of this case (Gov. Br. 11, 12) is that the issues presented here may be raised on appeal from a conviction after trial in the Western District. The Government undoubtedly will contend that the Western District has general jurisdiction to try petitioner for the same offense that was charged in the first indictment even if it obtained that jurisdiction erroneously: that is, in disregard of the defendant's rights under the Rules and the transfer order. The only relief which petitioner can get after

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[2] The Brief of the Government states:

> "Judge Kennerly was well aware of the problems which would confront the Government if trial were had at Laredo . . ." (Br. 10).

This should not be interpreted as meaning that he agreed that there were "problems". It is true that the prosecuting attorney objected vigorously to the transfer to Laredo. It is also true that the court specifically found, in ordering the transfer that:

> "I do not think that the evidence shows that the Government either will or might be under severe handicap . . ."

in that venue. (R. 35).

conviction in the Western District would be on a showing that he had not had a fair trial there. Such an issue is entirely different from the one that petitioner raises here.[3]

In substance the Government is here seeking to establish the power to remove a criminal trial from the district to which it has been transferred by the device of dismissal and reindictment. It wants to try petitioner in the district of its own choice regardless of the transfer order, and thus put him in a situation where he will be unable to assert the rights which we contend the order of transfer gave him. The question is whether or not such procedure violates the mandatory provisions of Rule 21 as to the place of trial when a case has been transferred. We think this issue presents a most important question of criminal procedure. If we are right on the importance of the issue certainly the Government can-

[3] We rely on *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329 (2d Cir. 1950), cert. den. 340 U.S. 841 (1950). The Government does not challenge that case, or its relevance to this one.

not escape a decision on the merits by the procedural legerdemain which constitutes its brief in opposition.

Respectfully submitted,

THURMAN ARNOLD
ABE. FORTAS
1229 19th Street, N. W.
Washington 6, D. C.
Counsel for Petitioner

Of Counsel
WILLIAM D. ROGERS
Arnold, Fortas & Porter
1229 19th Street, N. W.
Washington 6, D. C.

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